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In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE,
PETITIONER

v.

HARRY H. PEACH & SONS, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Agriculture, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 15–22) is reported at 425 F. 2d 1137. The opinion of the district court (App. D, *infra*, pp. 26–36) is reported at 299 F. Supp. 557.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1970 (App. B, *infra*, pp. 23–24). A timely petition for rehearing was denied on June 4, 1970

(App. C, *infra*, p. 35). On August 24, 1970, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 16, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Agricultural Marketing Agreement Act of 1937 provides that a handler regulated by a marketing order issued pursuant to the Act may challenge that order in an administrative proceeding before the Secretary of Agriculture. 7 U.S.C. 608c(15)(A). The Act further provides that if a handler is dissatisfied with the Secretary's decision, he may then obtain judicial review of that decision in the appropriate federal district court. 7 U.S.C. 608c(15)(B).

The question presented is whether this statutory scheme for reviewing marketing orders precludes direct judicial review of a marketing order at the behest of one who is not a handler and is not otherwise regulated by the marketing order.

STATUTE INVOLVED

The relevant provisions of Section 8c of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c, are set forth in Appendix E, *infra*, pp. 37–38.

STATEMENT

The Agricultural Marketing Agreement Act of 1937 authorizes the regulation of certain agricultural commodities, including tomatoes, which move in interstate commerce, through the issuance by the Secretary of

Agriculture of marketing orders governing the handling of these commodities. 7 U.S.C. 608c. The Act further provides for administrative and judicial review of a marketing order at the behest of a handler who is regulated by the order in question. Specifically,

> [a]ny handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.

7 U.S.C. 608c(15)(A). If dissatisfied with the Secretary's ruling on the administrative petition, the handler may seek review of "such ruling" in the appropriate district court. 7 U.S.C. 608c(15)(B). No other provisions for the review of marketing orders are contained in the Act.

Pursuant to the Act, the Secretary of Agriculture has issued, and from time to time amended, the Florida Tomato Marketing Order, 7 C.F.R. 966, and regulations implementing this order. Under the amended regulations effective during the 1968–1969 growing season, Florida handlers were precluded from shipping tomatoes below a specified size. Because the Act requires that whenever the marketing of domestic commodities is limited the same limitations be applied to imported commodities, the importation of Mexican tomatoes was restricted to those of the same size as Florida tomatoes. 7 U.S.C. 608e–1.

Respondent Harry H. Price and Sons, Inc., is engaged in the wholesale repacking of produce, including tomatoes imported from Mexico. Price purchases

"vine-ripe" Mexican tomatoes [1] from produce brokers in Dallas, Texas, packages them in plastic cartons, and sells them largely to supermarkets in the Dallas area. As a repacker, Price is not a handler of tomatoes within the meaning of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c(1) (see 7 C.F.R. 966.6 and 966.7); nor is Price an importer of tomatoes regulated by the limitation on importing tomatoes under 7 U.S.C. 608e–1.

2. Although as a non-handler, the administrative-judicial review provisions of 7 U.S.C. 608c(15) were not available to Price, it nevertheless brought this suit in the district court, seeking to obtain judicial review of the provisions of the marketing order and implementing regulations concerning tomato size limitations. The gravamen of the complaint was that the Secretary had exceeded his authority in increasing the size of tomatoes which could be handled under the marketing order. Price asserted it had relied on on the fact that the size limitations would remain the same throughout the marketing season, and had therefore purchased some $15,000 worth of boxes which were too small to hold the vine-ripe tomatoes that, in view of 7 U.S.C. 608e–1, Price's supplier would import.

The district court dismissed the action on the grounds that Price lacked standing to maintain the

[1] The major production areas for tomatoes sold in the United States are Florida, which produces largely "mature green" tomatoes that are then ripened off the vine, and Mexico, which produces primarily vine-ripened tomatoes. Because vine-ripened tomatoes remain on the vine longer, they are generally larger in size than mature green tomatoes.

action and that, in any event, the Secretary had not exceeded his authority in promulgating the challenged size limitations (App. D, *infra*, pp. 26–36). With regard to the standing question, the court pointed out that Price was neither a handler nor a importer and, accordingly, was not regulated by either the Florida marketing regulations or the import restrictions. The court then held that "under the [statute] Price is not such a person as has been given the right to question an order or regulation." (App. D, *infra*, p. 32).

The court of appeals reversed on the standing issue and remanded the case to the district court for further proceedings on the merits (App. A, *infra*, pp. 15–22). Finding controlling this Court's decisions in *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, and *Barlow* v. *Collins*, 397 U.S. 159, both of which had been decided after the district court's decision, the court concluded that Price had shown an economic injury and that it was arguably within the zone of protected interests disclosed by the declared policy of the Agricultural Agreement Marketing Act (App. A, *infra*, pp. 20–21). The court did not discuss, other than to cite, the explicit provisions contained in the Act for the review of marketing orders.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the orderly administration and review of commodity marketing orders promulgated by the Secretary of Agriculture under the Agricultural Marketing Agreement Act. If the decision below is allowed to stand,

highly technical and complex marketing orders will be subject to direct attack in the courts without first being reviewed in administrative proceedings. In granting non-handlers standing to launch direct attacks in the courts against such orders, the court of appeals improperly applied the "zone of interests" test of standing announced by this Court in *Data Processing, supra,* and *Barlow, supra,* without giving effect to this Court's admonishment in those cases that the intent of Congress to preclude review, if fairly perceived from the overall statutory scheme adopted by Congress for regulating the particular industry in issue, must be respected. 397 U.S. at 154, 156; 397 U.S. at 165.

An analysis of the Agricultural Marketing Agreement Act, which the court below eschewed, demonstrates that Congress intended the express statutory procedures for administrative and judicial review of marketing orders at the instance of handlers to be the exclusive means for challenging such orders. Thus, the pre-*Data Processing* decisions of other federal courts denying standing to non-handlers are still valid today and present a conflict with the decision below which this Court should resolve.

1. In *Data Processing,* this Court announced a two-step inquiry which must be made to determine whether a particular plantiff has standing to attack an administrative order: First, "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise" so as to satisfy the case or controversy requirement of Article III, 397 U.S. at 152, and second, whether the interest

sought to be protected by the plaintiff is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153. It is the resolution of the second question which requires an analysis of the statutory scheme in issue as "Congress can, of course, resolve the question one way or another." 397 U.S. at 154. As further elaborated in *Barlow*, 397 U.S. at 165:

> Whether agency action is reviewable often poses difficult questions of congressional intent; and the Court must decide if Congress has in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion.[2]

Both *Data Processing* and *Barlow*, however, involved statutes[3] which contained no provision either authorizing or limiting judicial review, and the Court, noting that preclusion of judicial review was not lightly to be inferred, 397 U.S. at 166, found that the respective plaintiffs were arguably within the zone of interests sought to be protected by the statutes to which they were subject and accordingly found that they had standing to challenge the administrative actions in issue.

The Agricultural Marketing Agreement Act, however, is not silent as to administrative and judicial

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[2] The Administrative Procedure Act, 5 U.S.C. (Supp. V) 701(a), provides for judicial review of agency action except where "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."

[3] The Bank Service Corporation Act, 12 U.S.C. 1864, and the Food and Agriculture Act, 7 U.S.C. (Supp. IV) 1444(d), respectively.

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review of commodity marketing orders promulgated by the Secretary of Agriculture. Under 7 U.S.C. 608c (15)(A), the legality of these complex orders may first be tested by handlers in administrative proceedings before the Secretary of Agriculture. The Secretary's ruling upon completion of such proceedings may then be reviewed in an appropriate district court. 7 U.S.C. 608c(15)(B).[4] Finally, the Secretary is permitted to enforce the marketing order pending the outcome of the judicial proceedings. *Ibid.* No provision is made in the Act for the direct attack of marketing orders in the courts.

Congress had sound reasons for concluding that attacks by handlers upon marketing orders should be considered by the Secretary in the first instance. The questions raised in such attacks are often complex and their resolution requires an intimate knowledge of the economic and technical factors underlying the marketing of the various agricultural products subject to regulation—*e.g.*, milk, fruits, tobacco, vegetables, hops, honeybees, and naval stores. 7 U.S.C. 608c(2). It is thus desirable that, before judicial intervention is sought, these questions be presented to the Secretary who possesses the requisite

[4] The question of whether, once the Secretary issues a ruling in response to an administrative challenge of a marketing order by a handler, a nonhandler could seek judicial review of such ruling is not presented by this case as Price's action in the district court constituted a direct attack on the tomato marketing order. In our view, the judicial review provided for by 7 U.S.C. 608c(15)(B) would be available only to those persons (necessarily handlers) who had participated in the administrative proceedings before the Secretary.

expertise to illuminate and resolve them. Further, should the administrative petition be denied and resort to the courts become necessary, judicial review will be facilitated if the district court has the benefit of the Secretary's expert judgment about the case.

This Court recognized the importance of these considerations in *United States* v. *Ruzicka*, 329 U.S. 287. In rejecting the effort by a handler to attack for the first time the validity of an order of the Secretary of Agriculture as a defense to a judicial enforcement proceeding brought by the Secretary, the Court stressed the purposes of the statutory review provisions (329 U.S. at 294):

> Congress has provided a special procedure for ascertaining whether such an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture. It is on the basis of his ruling and of the elucidation which he would presumably give to his ruling, that resort may be had to the courts. * * *

The need for prior administrative expertise and elucidation is no less when an order is challenged by a non-handler, and the lower federal courts have expressly applied *United States* v. *Ruzicka* to such challenges. *E.g., Uelman* v. *Freeman*, 267 F. Supp. 842,

845 (E.D. Wisc.), affirmed on opinion below, 388 F. 2d 308 (C.A. 7), certiorari denied, 390 U.S. 1026; *United States* v. *Lehigh Valley Cooperative Farmers, Inc.*, 294 F. Supp. 140, 145 (E.D. Pa.).

In view of the express provisions for the administrative review of handler challenges to marketing orders, Congress could not have intended that nonhandlers should be allowed directly to attack such orders in the courts.[5] Rather, a consideration of the Act as a whole shows that the judicial review provisions of 7 U.S.C. 608c(15)(B) were meant to be exclusive. What little legislative history there is of those provisions, moreover, supports this interpretation since there is evidence that Congress was concerned about the danger of multiple suits tying up administrative action. Both the House and the Senate Committee reports on the legislation point out that "[s]pecific provision is made for administrative and judicial review of orders." H. Rep. No. 1241, 74th Cong., 1st Sess., p. 14; S. Rep. No. 1011, 74th Cong., 1st Sess., p. 14. After discussing those provisions, the reports conclude that "these provisions establish an

[5] This Court recognized a limited exception to this rule in *Stark* v. *Wickard*, 321 U.S. 288. There milk producers challenged certain deductions which were made from the so-called "producers settlement fund" established in connection with a milk marketing order. In granting standing to the producers, this Court pointed out that they had a proprietary interest in the fund, and that it "is because every dollar of reduction comes from the producer that he may challenge the use of the fund." 321 U.S. at 308. This rationale is inapplicable except in the circumstances presented in *Stark* v. *Wickard*, and producers raising other challenges and other nonhandlers have been held not to have standing (see *infra*, p. 12).

equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms." *Ibid.*

The court of appeals' authorization of a direct attack on marketing orders by anyone "in the marketing chain * * * between producer and consumer," even where he is only "indirectly affected" by the order (App. A, *infra*, p. 21), frustrates the expressed intent of Congress to provide for the review of marketing orders without unduly interfering with the government's power to implement them. By opening the courts in the first instance to non-handlers who are not authorized by the Act to seek administrative review, the decision precludes the application of the expertise Congress intended to be brought to bear upon marketing order challenges. Moreover the decision provides the handler—heretofore required to exhaust his administrative remedies, see, *Willow Farms Dairy, Inc.* v. *Benson*, 276 F.2d 856 (C.A. 4)—with a ready means for bypassing the administrative proceedings required by the statute. The handler need only find someone with whom he deals in the "marketing chain" who is willing to lend his name to an action in the district court, raising precisely the same objections that the handler (if he proceeded in his own name) would have had to raise initially in an administrative proceeding.[6] Where a handler decides that an initial

[6] *E.g.*, *Kresse v. Hardin*, D. Ariz., No. 69-496, decided January 19, 1970, appeal pending, No. 25,669 (C.A. 9), where an unincorporated association denominated the "Concerned Consumers" brought suit against the Secretary of Agriculture at-

ruling by the Secretary on his contentions would not be to his advantage, he may thus avoid administrative consideration. Thus the decision is likely to eliminate in a significant respect the carefully limited statutory provisions for administrative review. A decision with such a far-reaching import upon the administration of a significant federal program warrants review by this Court.

2. The decision below also conflicts with decisions which have denied standing to parties not regulated by an order promulgated under the Act. *E.g., Uelman* v. *Freeman*, 267 F. Supp. 842 (E.D. Wisc.), affirmed 388 F. 2d 308 (C.A. 7), certiorari denied, 390 U.S. 1026; *Benson* v. *Schofield*, 236 F. 2d 719 (C.A.D.C.); *United Milk Producers of New Jersey* v. *Benson*, 225 F. 2d 527 (C.A.D.C.); *Kresse* v. *Hardin* (D. Ariz., No. 69–496, decided January 19, 1970, appeal pending, C.A. 9, No. 25,669); see *United States* v. *Lehigh Valley Cooperative Farmers, Inc.*, 294 F. Supp. 140 (E.D. Pa.); cf. *Calhoun* v. *Freeman*, 316 F. 2d 386 (C.A.D.C.). In *Benson* v. *Schofield, supra*, the court concluded that producers could not bring an action for injunctive relief from a marketing order, since such orders are "subject to review only as the Act provides." The court went on to point out, with regard to the exclusiveness of the review procedures, that (236 F. 2d at 722)

> (w)hen we have in mind the purposes of the legislation, it is difficult to see how Congress

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tacking a milk marketing order; a simultaneous suit brought by a handler raising the same objections to the order was dismissed on the grounds that the handler had not exhausted his administrative remedies.

in these respects could more effectively have expressed its will than is evident from a mere reading of the Act. If appellees were to be deemed handlers, they would be bound by the administrative remedy and the judicial review provisions of the Act. Appellees, viewed as producers, being unregulated, are given by the Act no greater status than the handlers who are regulated.

A fortiori, Price, a tomato repacker, was not intended by Congress to have the right to challenge the orders here at issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1970.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 27965

HARRY H. PRICE & SONS, INC., ET AL.,
PLAINTIFFS-APPELLANTS

v.

CLIFFORD M. HARDIN, SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF THE UNITED STATES, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

(April 27, 1970)

Before Jones, Bell and Godbold, Circuit Judges

JONES, Circuit Judge: The appellant, Harry H. Price & Sons, Inc., is a tomato repacker and wholesaler whose principal place of business is located in Dallas, Texas. It purchases the majority of its tomatoes from importers who receive vine-ripened tomatoes from Mexico. The initial question before this Court is whether the appellant has standing to challenge the validity of certain administrative orders or

regulations, issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act,[1] which, it is alleged, have severely restricted the importation of vine-ripened tomatoes from Mexico and thus caused substantial injury to appellant's business.

The Agricultural Marketing Agreement Act provides a comprehensive scheme for the regulation of agricultural commodities, including tomatoes, which move in interstate commerce. The declared policy of the Act is to protect the interests of the farmer and consumer through the establishment of "orderly marketing conditions."[2] To carry out the policy of the Act, the Secretary of Agriculture is given the power to promulgate marketing orders applicable to "processors, associations of producers, and others engaged in the handling" of those agricultural commodities covered by the Act.[3] The orders may contain terms relating to grade, size, and quality standards and other such terms as may be necessary to effectuate the provisions of such order.[4] The Act also contains provisions regarding procedures for adopting marketing orders, including formal notice and hearing, and grants review of a marketing order to any "handler subject to an order. . . ."[5] The effect of a marketing order is not limited to those commodities produced domestically, for Section 608e–1 of the Act provides that whenever a marketing order contains terms regulating the grade, size, quality, or maturity of a regulated commodity, the importation of that commodity is prohibited unless it complies with the provisions of such order or other comparable restriction.

[1] 7 U.S.C.A. § 601 et seq. (1964).
[2] 7 U.S.C.A. § 602 (1964).
[3] 7 U.S.C.A. § 608c(1) (1964).
[4] 7 U.S.C.A. §§ 608c (6)(A), (7)(D) (1964).
[5] See 7 U.S.C.A. §§ 608c (3), (4), (15) and (17) (1964).

Pursuant to this statutory authority, the Secretary, in 1955, issued an order regulating the handling of tomatoes grown in Florida.[6] Effective July 12, 1968, this order was amended to authorize regulations limiting "the handling of particular grades, sizes, qualities (including maturity as a factor of grade or quality), or packs of any or all varieties of tomatoes, during any period." Section 966.52, 33 Fed. Reg. 8585 (1968). As amended, the order limited the definition of "handler" to those persons who "sell, transport or in any other way to place fresh tomatoes, produced in the production area [certain Florida counties], in the current of commerce between the regulation area [Florida] and any point outside thereof in the United States, Canada, or Mexico." 33 Fed. Reg. 8585–86 (1968). Both the order and its amendment were issued after notice and the opportunity for a hearing as required by 7 U.S.C.A. § 608c(3).

Three regulations were issued by the Secretary pursuant to Section 966.52 of the amended 1955 marketing order. The first of these, issued after 30-day notice was given, became effective November 15, 1968, and was to be in effect until July 31, 1969.[7] It limited the handling of tomatoes to those over 2⅛ inches in diameter. A companion tomato import restriction became effective on the same date, and the restriction noted that it was subject to amendment on three days' notice as domestic regulations changed.[8] Two other regulations, effective January 8, 1969 and April 14, 1969,[9] were issued by the Secretary without notice under the authority of the emergency rule-making provisions of

[6] 7 C.F.R. 966.1–150 (as amended 1961).

[7] 33 Fed. Reg. 16010 (1968).

[8] 33 Fed. Reg. 16110 (1968).

[9] 34 Fed. Reg. 128 (1969); 34 Fed. Reg. 6326 (1969).

the Administrative Procedure Act.[10] These regulations took an approach not theretofore used in requiring a degree of maturity and size as a test for availability for shipment. Thus, mature green tomatoes were shipable[11] in January and April if they were larger than $2^{9}/_{32}$ inches and $2^{17}/_{32}$ inches respectively, whereas tomatoes more advanced in maturity, such as vine-ripened reds, could be shipped in January and April only if they were larger than $2^{11}/_{32}$ and $2^{20}/_{32}$ inches respectively.[12] As these regulations became effective, import restrictions were adjusted accordingly.[13]

In an action brought to enjoin the Secretary from enforcing the January and April 1969 import restrictions, the appellant challenged the validity of the "regulations" upon which the import restrictions were based. In its complaint, the appellant alleged that "because of the limited seasonal nature of the commodity in question, and because of the heavy investment in supplies and materials made . . . all of which will be totally wasted, plaintiff will suffer irreparable

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[10] "Except when notice or hearing is required by statute this subsection [requiring notice] does not apply... (b) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C.A. § 553(b) (1967).

[11] This word can be found in dictionaries as an obsolete term meaning "navigable." We are introduced to it by the brief of the Secretary of Agriculture who apparently uses it to mean able to be shipped, or available for shipment.

[12] These regulations, which used maturity as a standard, were issued pursuant to the amended marketing order of the Secretary which became effective July 12, 1968. See text supra and Section 966.52, 33 Fed. Reg. 8585 (1968).

[13] 34 Fed. Reg. 128 (1969); 34 Fed. Reg. 6327 (1969).

injury. . . ." The Secretary of Agriculture filed a motion to dismiss the complaint on the grounds that the appellant had no standing to bring and maintain the action and that the complaint failed to state a cause of action. No answer was filed. The case was set for hearing on an application for an injunction pendente lite. The court suggested and the parties agreed that the hearing should be regarded as a final hearing on the merits. Many contentions were made in the complaint, including claims that the Act is unconstitutional, which contention is no longer being relied upon; the January and April 1969 "regulations" were in fact amendments to a marketing order and are thus invalid for lack of notice and opportunity to be heard; the Secretary exceeded his authority in issuing regulations; the Secretary could not use maturity as a test for the handling of tomatoes; the Secretary failed to discharge a statutory duty to give proper notice of a change in import restrictions to appellant and others similarly situated; the regulations were capricious and arbitrary and hence void and unenforceable; and, the appellant was wrongfully denied a hearing on its claim for exemption from the application of the import restrictions.

The district court sustained the motion to dismiss on both of the stated grounds, holding that the appellant had no standing to bring and maintain the suit and holding that the complaint did not state a cause of action.[14] The district court also considered some but not all of the appellant's contentions on the merits and resolved these issues against it.

The district court, in its determination that the appellant had no standing to bring and maintain this

[14] Harry H. Price & Son Inc. v. Hardin, N.D. Tex. 1969, 299 F. Supp. 557.

action, relied, in part, upon the decisions in *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947, and *Barlow v. Collins*, 5th Cir. 1968, 398 F.2d 398.[15] We are not in disagreement with the conclusions of the district court as to standing to the extent that they were based upon statements found in reports of the decided cases at the time the district court judgment was entered. However, subsequent to the entry of the district court judgment, the Supreme Court has decided two cases in which it handed down opinions that render the conclusion of the district court erroneous. *Data Processing v. Camp*, 38 U.S.L.W. 4193 (U.S. March 3, 1970); *Barlow v. Collins*, 38 U.S.L.W. 4195 (March 3, 1970). In the *Data Processing* case the *Flast* decision is construed and by construction given a different meaning than that which the district court gave it. The *Barlow* case from this Circuit was reversed. The rule now applicable seems to be that if the applicant for relief alleges that the "challenged action has caused him injury in fact, economic or otherwise," then a determination should be made as to "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," and if it be so found, the plaintiff has standing. *Data Processing v. Camp*, supra.

It might be suggested that there are principles of law set forth in decided cases which are more easily understood and more readily applied than the above test of standing. In the case before us the appellant's complaint has shown economic injury. The appellant has certainly argued that it is within "the zone of interests to be protected or regulated." It does not

[15] The court held that the Administrative Procedure Act, 5 U.S.C.A. § 702, did not confer standing.

necessarily follow that because it has so argued that it is "arguably" within such zone of interests but we think the complaint demonstrates that the appellant has met the test of standing of the *Data Processing* case. It has been a handler of tomatoes of the kind and size the marketing of which is indirectly affected by the orders and regulations, and it was in the marketing chain of such tomatoes between producer and consumer. The declared policy of the Act [16] discloses a zone of interests and the appellant is, arguably, within that zone of interests. It follows that it has standing to bring and maintain the action.

The district court having decided that the appellant did not have standing to bring and maintain the action might have omitted any consideration of the

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[16] "It is declared to be the policy of Congress—

"(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

* * * * *

"(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

"(4) Through the exercise of powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C.A. § 602 (1964).

merits of the appellant's claim. If there is no standing on the part of a plaintiff, the court has no jurisdiction over the merits of the claim asserted. *Jenkins* v. *McKeithen*, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed.2d 396; *Flast v. Cohen*, supra. However, as has been noted, the district court stated that the complaint failed to state a claim upon which relief could be granted and in its opinion apparently held that this was also a ground for dismissal.

Since it is here held that the appellant has standing to bring and maintain the action, we consider the district court's apparent determination on the merits. The complaint was not free from imperfections but its defects were not such as required the granting, without leave to amend, of a motion to dismiss for failure to state a cause of action. Before final hearing an answer would be appropriate. The uncontradicted evidence of the appellant that it had sustained business losses was not the subject of notice or comment in the district court's opinion. This evidence, although not detailed or documented, was such as might have been considered in determining whether an irreparable injury had been shown. The district court observed that the only loss shown by appellant resulted from its inability to use some packaging materials it had purchased. The district court found that this was not an irreparable injury and so concluded that no irreparable injury had been shown.

It seems probable that the principal basis for the district court's decision was its determination that the appellant was without standing. Under such circumstances, we conclude that the interests of justice will be best served by vacating the judgment of the district court and remanding the cause for such proceedings as may be appropriate in the light of this opinion. VACATED AND REMANDED.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

OCTOBER TERM, 1969

No. 27965

D.C. Docket No. CA 3-3119-B

HARRY H. PRICE & SONS, INC., ET AL.,
PLAINTIFFS-APPELLANTS

v.

CLIFFORD M. HARDIN, SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF THE UNITED STATES, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Before Jones, Bell and Godbold, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judg-

ment of the said District Court in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

It is further ordered that defendant-appellee pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

APRIL 27, 1970.

Issued as Mandate: June 15, 1970.

APPENDIX C

In the United States Court of Appeals for the Fifth Circuit

No. 27965

HARRY H. PRICE & SONS, INC., ET AL.,
PLAINTIFFS-APPELLANTS

v.

CLIFFORD M. HARDIN, SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF THE UNITED STATES, DEPENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF TEXAS

(June 4, 1970)

ON PETITION FOR REHEARING

Before Jones, Bell, and Godbold, Circuit Judges

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX D

In the United States District Court for the Northern District of Texas, Dallas Division

Civil Action No. 3-3119-B

HARRY H. PRICE & SONS, INC., ET AL

v.

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE

Plaintiff, Harold H. Price & Son, Inc., hereinafter called Price, sues the Secretary of Agriculture, hereinafter called Secretary, praying for the issuance of a temporary restraining order and a permanent injunction to restrain the Secretary from enforcing certain import regulations on the shipment of tomatoes into the United States.

The Secretary filed a motion to dismiss on the ground that Price lacked standing to sue and that the complaint failed to state a cause of action upon which relief could be granted. This Court agrees with both contentions of the Secretary.

Price is a wholesaler and re-packer of tomatoes, the majority of which he buys from importers of tomatoes from Mexico. He complains primarily of two regulations (which he contends are orders) promulgated by the Secretary, effective January 3, 1969 and April 14, 1969 and two import restrictions issued at the same time as the two regulations. These regulations and import restrictions prohibited the handling of tomatoes of a certain size and maturity. Price al-

leges the effect of the regulations and import restrictions is to severely restrict the importation of vine ripened tomatoes from Mexico.

It is Price's contention that the regulations of January 3, 1969 and April 14, 1969 and the import restrictions issued at the same time are invalid because the Secretary failed to give notice and hold hearings prior to promulgation.

Price further contends that he has invested heavily in supplies and materials which he will be unable to use unless the Secretary is restrained from the enforcement of the regulations heretofore referred to. He contends therefore that he will suffer irreparable injury.

A temporary restraining order was issued by this Court and a hearing had on the application for preliminary injunction. The Secretary filed a motion to dismiss and this motion was sustained after hearing on the preliminary injunction but prior to action on the application for preliminary injunction.

The policy of the Agricultural Adjustment Act is:

> "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish . . . parity prices [to farmers]"—[and] "to protect the interest of the consumer." 7 U.S.C. 602

An understanding of the contentions of the parties requires a discussion of the rules and regulations issued by the Secretary in connection with the sale and importation of tomatoes.

7 U.S.C. 608c authorizes the Secretary to issue, and from time to time amend orders applicable to processors, or "associations of producers, and others engaged in the handling of [certain] agricultural commodities."

In 1955 the Secretary issued a marketing order (7 C.F.R. 966.1–150 as amended) providing methods for

limitations on the handling of Florida tomatoes.[1] Section 966.52 of the order provided for the issuance of regulations which "would tend to effectuate the declared policy of the act."

An amended order, effective July 12, 1968 stated that such regulations may:

> (a) Limit, in any or all portions of the production area, the handling of particular grades, sizes, qualities (including maturity as a factor of grade or quality), or packs of any or all varieties of tomatoes,....

Both the order and the amendment were issued after notices and the opportunity for hearings as required by 7 U.S.C. 608(c)(3).

Three regulations have been issued pursuant to Section 966.52 of the Marketing Order tending "to effectuate the declared policy of the act." The first, effective November 15, 1968, was issued after notice was given, the later two, effective January 3, 1969 and April 14, 1969 respectively, were issued without such notice under the authority of 5 U.S.C. 553 (Administrative Procedure Act).[2]

The Secretary included in both of the challenged regulations the following statement:

> "It is hereby found that it is impracticable and contrary to the public interest to give preliminary notice, or engage in public rule making procedures, and that good cause exists for not

[1] 7 U.S.C. 608c (6) (A) authorizes orders "limiting or providing methods for the limitation * * * of any grade, size or quality" of specified agricultural commodities, including tomatoes.

[2] Section 553(b) provides in part: "Except when notice or hearing is required by statute this subsection [requiring notice] does not apply * * * (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

postponing the effective date of this amendment * * *."

Pursuant to 7 U.S.C. 608e–1 [3] the Secretary then issued similar import restrictions. It is the regulations effective without notice on January 3, 1969 and April 14, 1969 and the parallel import restrictions that are being challenged by Price as having been irregularly issued.

Thus the Secretary complied with the provisions of 7 U.S.C. 608c in the issuance of the marketing order and its amendment of July 12, 1968 and in the issuance of regulations pursuant to Section 966.52 of the Marketing Order "to effectuate the declared policy of the act" and in the issuance of import restrictions. Price's contention that the regulations of January 3, 1969 and April 14, 1969 are orders is without merit.

It is contended by Price that since the "regulation" effective November 15, 1968 was issued only after notice the Secretary is issuing orders which require notice. But this is not so. The Secretary is required to give notice of all proposed regulations unless the particular regulation and the exigencies of the then existing situation make notice "impracticable, unnecessary or contrary to the public interest." As heretofore pointed out the Secretary made such findings as to the challenged regulations which is sufficient to comply with the statute regarding notice.

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[3] 7 U.S.C. 608e–1 provides in part: "* * * whenever a marketing order * * * contains any terms * * * regulating the grade, size, quality, or maturity of tomatoes * * * produced in the United States the importation into the United States of any such commodity * * * during the period of time such order is in effect shall be prohibited unless it complies with the grade, size, quality, and maturity provisions of such order or comparable restrictions promulgated hereunder * * *."

Price contends further that Section 608e–1 of 7 U.S.C. requires parallel import restrictions to be entered only when marketing orders are issued and not when the Secretary has merely promulgated regulations. This contention, however, is not valid. While the Act does provide for the issuance of import restrictions whenever a marketing order has been entered it goes on to state that "during the period of time such order is in effect (such product) shall be prohibited unless it complies with the grade, size, quality and maturity provision of such order or *comparable restrictions* promulgated hereunder." (Emphasis added). Moreover the contention urged by Price appears contrary to the purpose of the Agricultural Adjustment Act in which Section 608e–1 is a part. This section further provides for the Secretary to promugate such rules and regulations deemed necessary to carry out its provisions.

By requiring the imposition of import restrictions when marketing orders or "comparable restrictions" were entered controlling domestic commodities Congress developed a scheme by which the Secretary was required to regulate imports whenever domestic production was regulated. This the Secretary has done by issuing the parallel import restrictions complained of.

Price also seeks to have this Court issue a writ of mandamus requiring the Secretary to grant him and others so situated a hearing to determine whether they are entitled to an exemption from the provisions of the import regulations.

The marketing order regulating the Florida Tomato growers does provide for exemption relief for hard-pressed producers regulated by the marketing order. Clearly the exemption provided could only apply to people regulated thereunder. Price does not fall with-

in that class so there is nothing from which he could be exempted. Furthermore the section concerning import restrictions does not require hearings for any such hardship exemptions asserted by Price. That section does permit the Secretary to find that parallel restrictions on imported commodities are not practicable because of variations in characteristics between the imported and domestic commodities and to issue such classifications as he finds "will be equivalent or comparable to those imposed upon the domestic commodity under such order." The Secretary has not so found and this provision offers Price no relief.

The first ground for dismissal urged by the Secretary is that Price lacks standing to bring the action.

As previously stated Section 608c(1) of Title 7 U.S.C. authorizes the Secretary to issue "orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity * * *." Price is a repacker and wholesaler of tomatoes. He has admitted in his brief that he is not a grower or handler nor is he an importer. Thus he is not subject to the regulations nor the import restrictions relating to the size and maturity of tomatoes.

It is Price's contention, however, that he has standing under 5 U.S.C. 702 (formerly section 10(a) of the administrative procedure act), which provides:

> "A person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

In discussing standing the Supreme Court in the case of *Flast v. Cohen,* 392 U.S. 83 had this to say with respect to the determination of standing:

> "The various rules of standing applied by federal courts have not been developed in the ab-

> stract. Rather they have been fashioned with specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated." *Id.* at 101.
>
> "[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiceable." Id. at 99–100.

In the case before this Court it is clear that under the Agricultural Adjustment Act Price is not such a person as has been given the right to question an order or regulation.

Price's primary complaint is that he has, in reliance on earlier restrictions, purchased plastic cartons and wrappings for tomatoes too small to be handled under present regulations.

The injury complained of is economic. The Fifth Circuit has recently passed on two cases in which it has been held that economic injury is not sufficient to give standing.

In the case of *REA v. Central Louisiana Electric Company, Inc.* 354 F.2d 859 (5th Cir. 1966) the REA approved a loan to Louisiana Electric Cooperative, Inc. to construct a power plant and power line. Central Louisiana Electric Company, Inc. sued REA to enjoin the loan as it would infringe on Central's business. In holding that Central had no standing to sue the Court declared that "mere economic competition—made possible by government actions (even if allegedly illegal) does not give standing to sue to restrain such action."

In the case of Barlow v. Collins, 398 F.2d 398 (5th Cir. 1968), *cert. denied,* 385 U.S. 815 regulations issued by the Secretary of Agriculture were challenged

by tenant farmers who contended they were adversely affected. Again the Fifth Circuit held that mere economic harm "in the absence of an express or implied statutory grant of standing" was not sufficient to give standing. The Court concluded by saying "this case is one where however outrageous or unfair appellants consider the effects of this regulation, their remedy lies not in the Courts but in Congress."

Price cites this Court to the recent case of *Saxon* v. *Georgia Association of Independent Insurance Agents, Inc.*, 399 F. 2d 1010 (5th Cir. 1968). This consisted of two actions brought by licensed independent insurance agents for declaratory judgment and injunction against a national bank's operation of an insurance agency business in places having populations exceeding 500 persons. The Court held such operation was illegal and under such circumstances the insurance agents had standing to sue. In differentiating it from *REA* v. *Central Electric Company, supra,* and other similar power company cases the Court declared at p. 1018:

> That case [REA] was not a case of this kind and this case is not a case of that kind. The case here decided involved neither federally sponsored projects nor federally sponsored urban renewal projects. * * * Instead these cases involve unlawful competition by a national bank from which the power to compete has been withheld by Congress. Moreover the plaintiffs in these cases had a 'statutory aid to standing'.

Other cases cited by Price are likewise distinguishable. In Flast v. Cohen, *supra,* taxpayers contested the disbursement of federal funds under the Elementary and Secondary Education Act of 1965 to finance instruction and the purchase of educational materials for use in religious and sectarian schools, con-

tending that the Act violated the First Amendment. In holding that the taxpayer had status the Court declared:

> "Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction. *Id* at 102–103.

In *Stark* v. *Wickard*, 321 U.S. 288 (1943) the Court stated with reference to standing at 304:

> "It is only when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity of an interest personal to him and not possessed by the people generally."

This review of cases involving standing clearly shows that plaintiff does not have standing under the Administrative Procedure Act. The regulations involved herein do not regulate Price. They apply to producers, handlers and importers. He is a repacker and wholesaler. At most they have an adverse affect on his business. Such effect, if it exists is not sufficient to confer standing under the clause in 5 U.S.C. 702 reading "adversely affected or aggrieved by agency action within the meaning of a relevant statute." As held in the cases cited this clause refers only to situations in which a particular statute expressly confers standing on a person who is adversely affected or aggrieved by agency action under that statute.

Accordingly, it is clear that Price lacks standing to sue in this action.

In conclusion the complaint and evidence at the hearing on the preliminary injunction show that Price will not suffer any irreparable injury. His only damage is that he has purchased supplies, mostly cartons, which he cannot use because the size of the tomatoes has been limited. He contends that these were purchased in reliance on the regulation issued in November 1968. If he did make such purchases he did so at his own peril and after express notice that regulations do not necessarily remain unchanged. The import regulation (attached as Ex C to Price's own complaint expressly warned all interested parties that "The regulation is subject to amendment with adequate notice[4] as domestic regulations are changed." In addition a reading of Sec. 608e–1 reveals that rules and regulations may be issued whenever required to carry out the provisions of the act. The alleged investment in reliance or continuance of the initial import regulation cannot be relied on by Price.

Moreover the extent of the loss would appear to be minimal. While Price may not now be able to use his supplies, according to the affidavit of Paul A. Nicholson, Deputy Director, Fruit and Vegetable Division, Consumer and Marketing Service, United States Department of Agriculture, such containers may be of use at a later time of the year when tomatoes from various sources throughout the United States will be freely available.

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[4]The notice referred to is the notice required by 608e–1, i.e. not less than 3 days notice of effective date and in the case of tomatoes enough time to ship them from point of origin to point of entry.

This Court finds no irreparable injury resulting from the marketing regulations and import restrictions involved in this case.

For the reasons stated the motion to dismiss is sustained.

SARAH T. HUGHES,
United States District Judge.

APPENDIX E

STATUTORY PROVISIONS

The relevant provisions of Section 8c of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c, are as follows:

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

* * * * *

(15)(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with

the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

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